Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1999

MYSTIC TRANSPORTATION, INC.,
MYSTIC BULK CARRIERS, INC. and
LEONARD BALDARI,

Petitioners,

–v.–

CHARLES CARLTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether minimal indirect evidence of discriminatory intent is sufficient to defeat summary judgment in an employment discrimination case.

2. Whether a District Court should weigh all of the evidence or consider only the evidence favoring the non-movant in determining a motion for summary judgment in an employment discrimination case.

3. Whether the standard for granting summary judgment as a matter of law under Fed. R. Civ. P. 50 is the same as the standard for granting judgment as a matter of law under Fed. R. Civ. P. 56.

4. Whether the Second Circuit erred in reversing the District Court in contravention of established circuit precedent governing the disposition of summary judgment motions, and in doing so, improperly shifted the burden of proof to the employer which set forth a non-discriminatory explanation for its termination.

THE PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States:

1. Charles R. Carlton, Plaintiff/Respondent;
2. Mystic Transportation, Inc., Defendant/Petitioner;
3. Mystic Bulk Carriers, Inc., Defendant/Petitioner;
4. Leonard Baldari, Defendant/Petitioner;
5. Ethan Brecher, attorney for Plaintiff/Respondent;
6. Ronald B. Goodman, attorney for Defendants/Petitioners.

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The Opinion of the United States Court of Appeals for the Second Circuit is cited at 202 F.3d 129 (2d Cir. 2000). It is attached as Appendix A. The Opinion of the District Court is unreported. It is attached as Appendix B.

JURISDICTIONAL STATEMENT FOR THIS COURT

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Second Circuit entered on January 28, 2000, by a Writ of Certiorari under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The statute construed is the Age Discrimination in Employment Act, 29 U.S.C. §623(a) which reads:

> "It shall be unlawful for an employer - - (1) - - to discharge any individual or otherwise discriminate against any individual because of such individual's age..."

No.

In the United States Supreme Court

OCTOBER TERM, 1999

MYSTIC TRANSPORTATION, INC.,
MYSTIC BULK CARRIERS, INC.
and LEONARD BALDARI,

Petitioners,

-v.-

CHARLES R. CARLTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Charles R. Carlton's complaint alleging a claim of age discrimination pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq.*, the New York State Human Rights Law, Executive Law §296 *et seq.* and the Administrative Code of the City of New York §9-101, was dismissed by the United States District Court for the Eastern District of New York (Trager, J.) which found that Respondent failed, in the first instance, to establish a *prima*

facie case of age discrimination, and moreover, to adequately rebut the non-discriminatory explanation for his termination shown by Petitioners, Mystic Transportation, Inc., Mystic Bulk Carriers, Inc. and Leonard Baldari (collectively referred to as "Mystic" or "Petitioners").

FACTS

A. Background

Mystic is a small trucking company which transports heating oil and other petroleum products including gasoline, asphalt, dry powder cement and jet fuel (A. 92). Baldari is the President and sole shareholder of Mystic (A. 90, 728). In August 1988, Respondent was fifty years old when he was hired as a salesman for Mystic by Baldari (A. 92).

Mystic's profits are directly related to whether there is a cold or mild winter (A. 92-93). There was approximately a 20% drop in degree days (the index used which measures the ratio of fuel consumption to the day's average temperature) in the winter of 1994-1995, hence, an equally significant drop in Mystic's profits (A. 93). There was a shortfall of profits in the winter of 1994-1995 in the amount of approximately $1,400,000 (A. 93). By the Fall of 1995, Mystic was facing a loss of $1,083,455 (A. 93). Due to the undisputedly mild winter and its drastic effects, Mystic was forced to make economic cutbacks, which include the reduction of operating costs and the termination of eleven employees, including Respondent, which resulted in a savings of approximately $600,000 (A. 93-95; 127-137; 569-579). Respondent knew that Mystic was facing difficult financial times, since the cutbacks were discussed at meetings which he attended (A. 726-27).

Respondent was fired in April, 1995 during a meeting with Baldari and Michael Hiller, Mystic's Controller ("Hiller") (A 96). Respondent was one of only three terminated employees who was over forty (40) years of age when terminated; the remaining eight employees were under forty (40) years of age (A. 107).

B. <u>The Events Subsequent To Respondent's Termination</u>

Three months after Respondent was terminated, Baldari re-hired John Oravets ("Oravets"), a former Mystic employee, to assist with marketing and to build Mystic's dry powder cement business (A. 104). Baldari believed this new area of business would improve Mystic's financial condition because it would not have to be so dependent upon seasonal work. Oravets, who earned a degree in marketing, had prior experience and contacts in the construction business (A. 760; 104). About one year after Oravets was re-employed by Mystic, he assumed the title of "Director of Marketing" and continued to assist Baldari and work with Gounalis in marketing (A. 761). Oravets tripled the dry powder cement business in only six months, and ninefold in two years (A. 562).

Respondent filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") on or about September 25, 1995 (A. 444). Mystic utilized the services of the National Employers Council, Inc. ("NEC") to prepare a response to the charge. Michael Ryan, an NEC employee, cited Mystic's economic crisis as the reason for Respondent's termination (A. 446-47).

Mystic submitted to the EEOC that it had a decrease in profits in the first quarter of 1995 amounting to approximately $1.5 million dollars (A. 446-47). This sum came from a

comparison of the net profit of $584,000.00 from the first quarter of 1995 to the profit realized the year before in the amount of $1,968,848.00 (A. 93). Whether this unquestionably sizeable decrease may be deemed a "deficit" or "shortfall" is not relevant because the figures are undisputed and show the same fact: In 1995, Mystic made only a fourth of the profits it had in the first quarter of the prior year (A. 93). This substantial loss in profits represented the funds which kept the company financially afloat for the remaining months of the year (A. 557; 564). After its investigation, the EEOC issued a determination in Mystic's favor, stating that the "majority of employees who were discharged along with you by [Mystic] were under the age of 40" and that Mystic "was facing a large monetary deficit at that time which was the contributing factor for [Respondent's] layoff" (A. 449).

C. The District Court's Decision

On July 1, 1998, United States District Court for the Eastern District of New York granted summary judgment to Mystic in a verbal decision on the record (A. 652), and subsequently issued a written opinion of its findings of fact and conclusions of law (A. 661-679). The District Court found that Respondent failed to establish a *prima facie* case of age discrimination because he could not show he was dismissed under circumstances giving rise to an inference of age discrimination (A. 664). The Court found Mystic's evidence of their age statistics and financial condition "compelling", which Respondent did not reasonably refute (*id.*).

The District Court also found that Respondent "failed to rebut [Mystic's] non-discriminatory explanation for his termination, namely, that economic conditions necessitated a reduction in operating costs" (A. 671). Taking Respondent's claim that he was told by Baldari to "retire" as true, the court

found that the statement was "at best ambiguous and hardly proof that age was relevant to the firing decision" particularly in light of the surrounding circumstances in which the alleged statement was made (A. 671-72). The court rejected Respondent's argument that Mystic's decision to select him as one of the eleven employees to be terminated based upon his mediocre performance was a pretext of age discrimination (A. 672, 674). Respondent's other arguments relating the Mystic's business decisions were also flatly rejected by the court (A. 674-75). The court went as far as calling one of the several factually unsupported arguments made by Respondent "border[ing] on the absurd" (A. 675), and determined that even assuming Respondent made out a *prima facie* case, he was not able to meet his burden of proof, especially in light of the evidence which was "'overwhelmingly tilted'" in Mystic's favor (A. 678).

D. <u>The Second Circuit's Decision</u>

The United States Court of Appeals for the Second Circuit reversed the District Court's decision, citing a conflict between Respondent's evidence establishing a *prima facie* case and Petitioner's proof in support of its non-discriminatory reason for his termination. The court mistakenly viewed Respondent's arguments and allegations of pretext as facts and failed to consider Petitioner's overwhelming evidence that it did not discriminate. The court concluded that the sole, alleged remark by Baldari suggesting Respondent should retire may "bear a more ominous significance" when considered within the totality of the evidence.

In reversing the District Court's decision, the panel of the United States Court of Appeals for the Second Circuit failed to follow previous, established holdings within the Second Circuit, whose history of previous cases are at odds with the approaches of various other Circuit Courts of Appeals.

POINT I

THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF THE SPLIT IN THE CIRCUIT COURTS OF APPEALS WITH RESPECT TO THE WEIGHT OF EVIDENCE THAT IS CONSIDERED IN A MOTION FOR SUMMARY JUDGMENT IN AN EMPLOYMENT DISCRIMINATION CASE.

Regarding the evidence necessary to create a factual issue under Title VII, this Court stated in *St. Mary's Honor Center, et al. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed 2d 407 (1993) "[R]ejection of the [employer's] proffered reasons will permit the trier to infer the ultimate fact of intentional discrimination and the Court of Appeals was correct when it noted that, upon such rejection, no additional proof of discrimination is required (internal citation omitted)." Some circuits hold that the above language from *Hicks* means that proof of a *prima facie* case coupled with proof of pretext is always sufficient to present a jury question. Other circuits disagree and require direct evidence of discriminatory intent (otherwise referred to as the "pretext plus" standard).

The Second Circuit has historically used the "pretext plus" test for determining the sufficiency of evidence required to present an employment discrimination case to a jury; see *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995), *vacated and remanded on other grounds*, 166 F.3d 442 (2d Cir. 1999) (stating "[a]n employer's reason for termination cannot be proven to be a pretext for discrimination unless it is shown to be false *and* that discrimination was the real reason.") (citing *Hicks*, 113 S. Ct. at 2752); *see also*, *Walsh v. United Cable Tech Services Corp. and Telecommunications, Inc.*, (unreported), attached as Appendix C (2d Cir. 1999), and *Tutko v. James River Paper Co., Inc.*, (unreported), attached as Appendix D (2d Cir. 1999), both of which held that summary

judgment in an employment discrimination case is appropriate where the plaintiff offers only 'unsupported assertions,' 'conjecture or surmise,' or 'conclusory statements' to support an essential element of his case. *Tutko, supra* (citing *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995)).

Several other circuits agree with the Second Circuit's analysis in determining that there must be additional evidence, other than evidence of a *prima facie* case, and pretext evidence, in order to create a jury question. *See Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) (the Supreme Court in *Hicks* did not mean *prima facie* case plus proof of pretext was always sufficient to present the jury question); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995) (to avoid summary judgment, plaintiff had to prove not only that the reason the employer presented was false, but that discrimination was the real reason); *Walton v. Bisco Industries, Inc.*, 119 F.3d 368, 370 (5th Cir. 1997) (a reason cannot be proven to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason).

Other circuits do not require additional evidence of discrimination. Rather, those circuits hold that elements of a *prima facie* case plus evidence of pretext are sufficient to create a triable issue. *See Sheridan v. E. I. Dupoint de Nemours & Co.*, 100 F.3d 1061, 1069 (3d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997) (evidence which supports a *prima facie* case, coupled with a jury determination that the employer's proffered explanation was pretextual, is sufficient to support a verdict of discrimination); *Fuentes v. Perski*, 32 F.3d 759, 761 (3d Cir. 1994) (to survive a motion for summary judgment, the plaintiff must introduce evidence which will cast doubt upon the reasons offered by the defendant so that the jury may infer that discrimination was the

motivating factor); *Anderson v. Baxter Health Care Corp.*, 13 F.3d 1120, 1122-23 (7th Cir. 1994) (the fact finder may find for the plaintiff when a *prima facie* case of discrimination is established and plaintiff also shows the falsity of the employer's proffered reasons); *Courtney v. Biosound Inc.*, 42 F.3d 414, 418 (7th Cir. 1994) (plaintiff will defeat a motion for summary judgment by producing evidence from which a jury could infer that the employer's proffered reason for termination was pretextual); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1994) (once plaintiff establishes a *prima facie* case and raises a genuine question as to whether the employer's explanation is true, there will also be a question for the fact finder); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997) (plaintiff in a discrimination case can avoid summary judgment by proving a *prima facie* case and showing that the employer's reasons are a pretext); and *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (in order to create a jury issue, plaintiff needs to establish a *prima facie* case and merely introduce evidence to discredit the employer's proffered reasons).

Inasmuch as the Circuit Courts of Appeals view the standard of proof in an age discrimination case in a different manner, some of which requiring a more stringent burden on the plaintiff than others, which, in effect, places an inappropriate burden on the employers contrary to the teachings of this Court, the Court should grant the instant application for a Writ of Certiorari in order to resolve this conflict.

POINT II

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S CONSIDERATION OF ONLY THE MINIMAL EVIDENCE OF THE NON-MOVANT IS INCONSISTENT WITH THE APPROACH OF, OTHER CASES WITHIN THE SECOND CIRCUIT AS WELL AS OTHER CIRCUITS WHICH WEIGH ALL OF THE EVIDENCE.

In reversing the District Court's decision, the Second Circuit adopted a standard of examining only the evidence presented by Respondent and ignored the overwhelming evidence demonstrating a lack of discriminatory animus presented by Petitioners (the movant). The Second Circuit's limited review of the evidence is inconsistent with the existing law as held by this Court and a string of previous decisions within the Second Circuit.

Justice White has described the conflict in the Circuit Courts in a dissenting opinion from this Court's previous denial of certiorari application as follows:

> [I]t is the Second Circuit's practice to examine all of the evidence in a manner most favorable to the non-movant party. This is also the position of at least the Fifth and Seventh Circuits. *Bowing Co. v. Shipman*, 411 F.2d 365, 374-75 (CA 5 1969) *Panter v. Marshall Field & Co.*, 646 F.2d 271, 281-282 (CA 7 1981). In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is considered, *Simpson v. Skelly Oil Co.*, 311 F.2d 563 (CA 8 1967). The First and Third Circuits allow a middle ground: the reviewing Court may

> consider uncontradicted unimpeached evidence from disinterested witnesses. *Layne v. Vinzant*, 657 F.2d 468, 472 (CA 1 1981); *Inventive Music Ltd. v. Cohen*, 617 F.2d 29, 33 (CA 3 1980). Thus, the federal courts of appeals follow three different approaches to determining whether evidence sufficient to create a jury issue.

Venture Technology, Inc. v. Nat'l Fuel Gas Distribution Corp., 459 U.S. 1007, 1009 (1982).

One Court of Appeals' decision which rejected the approach illustrated in the Second Circuit's decision in this case is *Sreeram v. Louisiana State University Medical Center-Shreveport, et al.*, 188 F.3d 314 (5th Cir. 1999) which found "[h]owever even if we were to find that such circumstantial evidence of pretext is present in this case, summary judgment is still appropriate where, as here, the evidence overwhelmingly support defendant's proffered non-discriminatory rationale." *Id.* at 230(citing *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996), which upheld summary judgment in defendant's age discrimination case where strong evidentiary support for defendant's cost-cutting rationale was not outweighed by age related comments such as 'old goat' and 'you just can't remember, your getting too old' which were made close in time to plaintiff's termination). *See also*, *Sturdivan v. Tri-State Feeders*, (10th Cir. 2000) (unreported) attached as Appendix E (plaintiff's belief that she was terminated because of her age based on mere conjecture, and therefore, insufficient to defeat summary judgment for the employer).

Further, the Second Circuit's determination in this case is inconsistent with its own previous determinations. *See, e.g.*, *Raskin vs. Wyatt*, 125 F.3d 55 (2d Cir. 1997), in which

summary judgment for the employer was affirmed on an age discrimination claim where the employer had stated to the plaintiff that he "assumed that (plaintiff) did not want to be office manager so late in his career" and that he was concerned the plaintiff might choose to retire and therefore "might not remain with (defendant) long enough to learn the (new) job." The court ruled that these comments were insufficient to rebut defendant's proffered reasons for not promoting plaintiff under both *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 109 S.Ct. 1775, 1794, 104 L.Ed.2d 268 (1989) (mixed motive analysis) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973) (burden shifting analysis) stating that "[T]he ADEA does not make all discussion of age taboo." *Raskin*, 125 F.3d at 63. Nor does an age-related comment necessarily reflect discriminatory animus. *Id.* (citing *de la Cruz v. New York City Human Resources Administration Department of Social Services*, 82 F.3d 16, 23 (2d Cir. 1996); *see also*, *Woroski vs. Nashua Corp.*, 31 F.3d 105, 108-110 (2d Cir. 1994) (where the employer was alleged to have stated that salaried employees "had been around too long, made too much money and enjoyed too many benefits" and that the company needed new, younger people which could be hired for half or 70% of what older workers earned, the employer won summary judgment; the court found that some evidence of age bias is not sufficient to overcome a properly supported motion for summary judgment).

In *Anderson vs. Liberty Lobby*, 477 U.S. 242, 251-253 (1986), this Court stated: "[t]he court has said that summary judgment should be granted where the evidence is such that it would require a directed verdict for non-movant party...and we have noted that "genuine issue" summary judgment standard is very close to reasonable jury directed standard." The primary difference between the two motions is procedural. Summary judgment motions are usually made before a trial

and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted. In essence, though the inquiry under each is same, whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is one sided that one party must prevail as a matter of law. *Anderson vs. Liberty Lobby*, 477 U.S. at 241-252. In *Deiner vs. Cincinatti Sub-Zero Products*, 58 F.3d 341, 343 (7th Cir. 1995), the Court adopted the federal "reasonable person standard" across the board: pre-trial, mid-trial, post-trial and on appeal, for evaluating both the merits and quantum of relief. If the Second Circuit had applied the *Anderson* teaching, then it would not have reversed the District Court's decision granting summary judgment. The Second Circuit Court of Appeals in this matter ignored the holding in *Anderson* and it progeny, as well as determinations of its own previous decisions, and allowed mere surmise and conjecture by Respondent to act as the basis to reverse summary judgment for Petitioner, when in fact no justification for submitting this matter to the jury was presented by Respondent.

POINT III

THE DECISION BELOW INAPPROPRIATELY SHIFTED THE BURDEN OF PROOF TO PETITIONERS.

A plaintiff in an age discrimination case must establish a *prima facie* case of unlawful discrimination by showing that:

1. He is a member of a protected class, *i.e.*, he is over the age of forty;
2. He performed his job satisfactorily;
3. He suffered an adverse employment action; and
4. He was terminated under circumstances giving rise to an inference of discrimination.

McDonnell Douglas, 411 U.S. at 802.

If the plaintiff establishes a *prima facie* case, a rebuttable presumption of discrimination arises and the burden shifts to the employer to articulate a legitimate non-discriminatory reason for the employment action. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. at 507; *Fisher v. Vassar College*, 114 F.3d 1332,1336 (2d Cir. 1997) (*en banc*), *cert. denied*, 522 U.S. 1041, 118 S.Ct. 851 (1998), *ren'g denied*, 523 U.S. 1041, 118 S.Ct. 1341 (1998). If the defendant articulates a legitimate non-discriminatory reason for its actions, the presumption of discrimination is rebutted. *Hicks*, 509 U.S. at 511; *Fisher*, 114 F.3d at 1346-47.

Petitioner has consistently maintained that it fired Respondent and ten other employees in April 1995 as part of a legitimate, business-motivated, downsizing which was necessary in view of the loss of profits that the company was suffering. Petitioner's actions were supported by documentary

evidence and was sufficient to shift the burden of proof back to Respondent.

After the employer has proffered a legitimate, non-discriminatory explanation, the plaintiff must show that the employer's proffered reason is false and that discrimination was the real reason for the adverse employment action. *Hicks, supra*, 509 U.S. at 515. *See Fisher v. Vassar*, 114 F.3d at 1337; but see, *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 82 (2d Cir. 1983) (plaintiff *not* required to show that the reasons offered by the employer were false)(emphasis added).

The circuit courts have stressed the importance of focusing on the ultimate question of whether or not the defendant acted because of the plaintiff's age. The First and Fifth Circuits have recognized that it is more appropriate to not even put this issue to a jury. *Loeb v. Textron, Inc.*, 20 Fair Emp. Prac. Cas. (B.N.A.) (1st Cir. 1979); *Haring v. CPC International, Inc.*, 664 F.2d 1234 (5th Cir. 1981). These decisions have noted it is the judge who must make the determination of whether the proffered reasons are legitimate, non-discriminatory reasons and since a burden of production merely requires the defendant produce some evidence, the judge alone may determine whether the defendant has met its burden.

A plaintiff has the ultimate burden of proving that age was the determining factor in the employer's decision to terminate. The Second Circuit has previously found that a plaintiff may prove age was a motivating factor through the presentation of either direct or circumstantial evidence; however, the circumstantial evidence must be tied directly to the alleged discriminatory animus. The Court describes such evidence as non-statistical evidence in the form of policy documents or statements by a decision maker that reflect discriminatory or retaliatory animus. *See Ostrowski vs. Atlantic Mut. Ins. Companies*, 968 F.2d 171, 181-182 (2d Cir. 1992) ("To allow

a party to defeat a motion for summary judgment by offering purely conclusory allegations of discrimination absent any concrete particular would necessitate a trial in all Title VII cases. Given the ease with which these suits may be brought and the energy and expense required to defend such actions, we believe that the trial judge may properly grant summary judgment.") *Meiri vs. Dacon*, 759 F.2d 989, 998 (2d Cir.), *cert. denied*, 474 U.S. 829, 106 S.Ct. 91 (1985).

The Eight Circuit found that a comment by a decision maker stating: that the plaintiff's replacement was the "right age" was not direct evidence of age discrimination since the comment made no direct reference to the plaintiff's age and since the plaintiff offered no additional evidence of discriminatory attitude. *E.W. Blanch Co. vs. Enan*, 124 F.3d 965, 970 (8th Cir. 1997).

In the present case, Mystic had similarly offered a valid, non-discriminatory reason for the discharge of Respondent and ten other employees. The economic success of the Petitioners is directly related to the climate in the winter months and the overall severity of the winter season. The colder the season, the more profitable the business for Petitioners. The winter of 1994-1995 was unusually warm, and as a result, Petitioners suffered a severe loss of profits, which was the motivating sole factor behind its decision to terminate eleven employees. Petitioners have offered substantial, concrete and direct evidence documenting the losses that they suffered in 1995.

In response, Respondent's sole example of a discriminatory intent is an allegation that he was replaced by two younger employees, and an unsupported statement allegedly made to him that it was time for him to "retire." One of the younger employees (Lydia Gounalis) was hired one year prior to Respondent's termination. There is nothing

suspect about hiring an employee one whole year prior to Respondent's termination. Furthermore, the employment of John Oravets, hired three months after Respondent's termination, was not contemplated by Petitioners at the time of Respondent's termination. After Respondent was terminated, Petitioners learned that Stuveysant, one of its larger accounts, was acquiring a heating oil supplier and that this additional work would require more of Baldari's time. Oravets was hired to cultivate the dry powder cement business, a new area for Petitioners. Petitioners hoped that the dry powder cement business would become successful and reduce some of the loss resulting from the mild winter. Indeed, the dry powder cement business tripled in the six months following Oravets' employment and increased ninefold in the two years after his employment.

Respondent's allegation regarding the age-related comment made by Baldari at his termination meeting is uncorroborated. Respondent's only evidence of the alleged incident is his own self-serving interpretation. Respondent's evidence is insufficient to prove that Petitioners' offered explanation was pretextual.

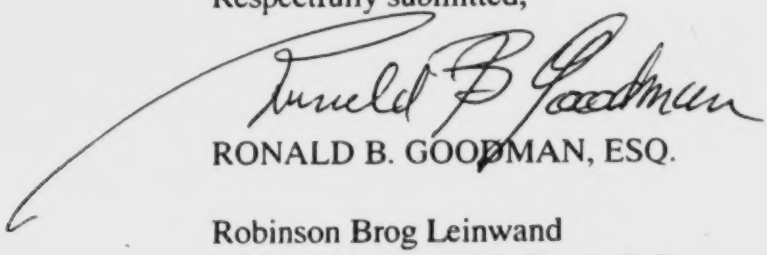
The Second Circuit's decision in this matter contravenes prior decisions of the Second Circuit and the standards of this Court. It has shifted the burden of proof inappropriately to Petitioners, but in the very least, did not take into account that ultimately, Respondent failed to meet his burden of proof.

CONCLUSION

This case presents important questions regarding the standard for summary judgment in employment discrimination cases. The Courts of Appeals have taken different approaches on the various aspects of the burden-shifting analysis and levels of proof with respect thereof, hence, therefore, review by this Court is warranted.

Dated: New York, New York
April 17, 2000

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: May 20, 1999 Decided: January 28, 2000)

Docket No. 98-7973

CHARLES R. CARLTON,

Plaintiff-Appellant,

—v.—

MYSTIC TRANSPORTATION, INC., MYSTIC BULK CARRIERS, INC., and LEONARD BALDARI,

Defendants-Appellees.

Before:

CARDAMONE, JACOBS, *Circuit Judges*, and MCMAHON*, *District Judge*.

Plaintiff Charles R. Carlton appeals from a grant of summary judgment entered July 10, 1998 in the United States District Court for the Eastern District of New York (Trager.

* Hon. Colleen McMahon, United States District Court Judge for the Southern District of New York, sitting by designation.

J.) in favor of defendants Mystic Transportation, Inc., Mystic Bulk Carriers, Inc. and Leonard Baldari.

Reversed and remanded.

ETHAN A. BRECHER, New York, New York (Christine A. Palmieri, Liddle & Robinson, L.L.P., New York, New York, of counsel), *for Plaintiff-Appellant*.

RONALD B. GOODMAN, New York, New York (Christy L. Reuter, Robinson Brog Leinwand Greene Genovese & Gluck P.C., New York, New York, of counsel), *for Defendants-Appellees*.

CARDAMONE, *Circuit Judge*:

Plaintiff Charles R. Carlton, formerly employed as director of marketing by defendants Mystic Transportation, Inc., Mystic Bulk Carriers, Inc. and Leonard Baldari, appeals from a grant of summary judgment in favor of defendants entered July 10, 1998 in the United States District Court for the Eastern District of New York (Trager, J.). Carlton asserts he was fired on account of his age, but defendants declare plaintiff's discharge occurred as part of a company-wide reduction-in-force and because of his mediocre job performance.

One of the arguments the employer raises in this employment discrimination case is the "same actor inference." The premise underlying this inference is that if the person who fires an employee is the same person that hired him, one can-

not logically impute to that person an invidious intent to discriminate against the employee. Such an inference is strong where the time elapsed between the events of hiring and firing is brief. Here it is not. And, the enthusiasm with which the actor hired the employee years before may have waned with the passage of time because the relationship between an employer and an employee, characterized by reciprocal obligations and duties, is, like them, subject to time's "wrackful siege of battering days." William Shakespeare, Sonnet LXV, *in The Complete Works of William Shakespeare*, (W.J. Craig ed., Oxford Univ. Press 1928).

In reviewing a grant of summary judgment for an employer, we examine the record to see if any genuine issues of material fact exist regarding whether the non-discriminatory reasons the employer advanced for the employee's discharge were instead a pretext for intentional age discrimination. Because we find several unresolved issues of material fact in this record, we reverse and remand.

BACKGROUND

Mystic Transportation, Inc. is a trucking company that delivers heating oil within the New York metropolitan area, and Mystic Bulk Carriers, Inc. transports gasoline, asphalt, cement, and jet fuel in the same market. The two companies have consolidated financial statements and are inextricably intertwined. Leonard Baldari is Mystic's president and sole shareholder. The defendants will be collectively referred to as Mystic.

In August 1988, at age 49, plaintiff Carlton was hired as a salesman by Baldari, who shortly thereafter appointed him as director of marketing. The principal duties of that position included soliciting new accounts with the aim of increasing his employer's delivery income. Mystic's delivery income

increased each year that Carlton was employed, and nearly doubled overall from $12,485,480 in 1989 to $23,622,567 in 1994. Carlton also brought in 65 new accounts.

Due to a mild winter in 1995, Mystic's profits dropped $1,400,000 in that year's first quarter from those the company had enjoyed in the first quarter of 1994. In April 1995 Carlton, then 56 years old, was terminated. He alleges that during a meeting regarding his discharge, Baldari suggested he should "retire." Ten other employees were also discharged in early 1995.

One year prior to plaintiff's dismissal, Mystic hired Lydia Gounalis (age 38) to assist with marketing. Immediately after plaintiff was fired, Gounalis assumed his position as director of marketing. Three months later, Mystic hired a former employee, John Oravets (age 31), to work in marketing. Oravets' previous employment with defendant had been terminated in 1993 for insubordination. After he was rehired, Oravets took over the director of marketing position in June 1996.

Carlton filed an age discrimination complaint with the EEOC on September 25, 1995. Mystic stated in response that it had a deficit of $1.5 million in the first quarter of 1995—it turned out Mystic actually had an operating profit of $584,108 during that quarter, but it was about $1.4 million less than the previous year's profits for the same period. Mystic also stated that Carlton's performance was not a factor in its decision to discharge him. After its investigation, the EEOC issued a determination in defendants' favor.

On August 19, 1996 Carlton commenced the instant action in the Eastern District alleging a violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.* (1994); the New York State Human Rights Law, N.Y. Exec. Law § 296(1)(a) (McKinney Supp. 1999); and the

Administrative Code of the City of New York § 8-101. In contrast to the EEOC proceeding, Mystic averred in the district court that it discharged Carlton not only as part of a reduction-in-force due to the economic downturn it experienced, but also because of his poor performance. The district court granted Mystic's motion for summary judgment finding that plaintiff had failed to establish a *prima facie* case of age discrimination. It further stated that even assuming arguendo that plaintiff had made out a *prima facie* case, he did not adequately demonstrate that his employer's purported reasons for discharging him were a pretext for age discrimination.

This appeal followed.

DISCUSSION

I Legal Principles

A. *Summary Judgment*

We review a district court's grant of summary judgment *de novo*, *see D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998), applying the same standard as the district court. This standard states that summary judgment may not be granted unless there are no genuine issues of material fact present, so that the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The burden of showing that no genuine factual dispute exists rests upon the moving party, *see Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994), and in assessing the record to determine if such issues do exist, all ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This remedy that precludes a trial is properly granted only when no rational finder of fact could find in

favor of the non-moving party. *See D'Amico*, 132 F.3d at 149; *Gallo*, 22 F.3d at 1224.

Because this is a discrimination case where intent and state of mind are in dispute, summary judgment is ordinarily inappropriate. *See Gallo*, 22 F.3d at 1224; *Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 103 (2d Cir. 1989); *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985). Thus, a trial court should exercise caution when granting summary judgment to an employer where, as here, its intent is a genuine factual issue.

B. *The ADEA and the Burden of Proof*

The ADEA provides that it is "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). This protection extends to employees who are at least 40 years old. *See id.* § 631(a). Plainly, the purpose of the ADEA is to prohibit discrimination in employment on account of age. As Judge Learned Hand explained, "statutes should be construed . . . with some imagination of the purposes which lie behind them." *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 552 (2d Cir. 1914). Hence, it is important for a court when reviewing this kind of case to bear in mind the findings Congress made at the time of the ADEA's enactment. Among those findings was that older workers are disadvantaged in retaining employment and regaining it after being discharged, and that unemployment among older workers, relative to younger ones, was high. *See id.* § 621(a).

In an employment discrimination case, the plaintiff has the initial burden of "proving by the preponderance of the evidence a prima facie case of discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-253 (1981);

see St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (noting plaintiff's burden); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (same). In order to establish a *prima facie* case of age discrimination, the plaintiff must show that he was (1) within the protected age group; (2) qualified for the position; (3) discharged; and (4) that such discharge occurred under circumstances giving rise to an inference of discrimination. *See Norton v. Sam's Club*, 145 F.3d 114, 118 (2d Cir. 1998); *Gallo*, 22 F.3d at 1224. The burden of establishing a *prima facie* case is not a heavy one. One might characterize it as minimal. *See St. Mary's Honor Ctr.*, 509 U.S. at 506; *Scaria v. Rubin*, 117 F.3d 652, 654 (2d Cir. 1997) (per curiam); *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) (describing the burden of production as *de minimis*).

If the plaintiff establishes a *prima facie* case, a rebuttable presumption of discrimination arises. *See Stratton v. Department for the Aging*, 132 F.3d 869, 879 (2d Cir. 1997); *Gallo*, 22 F.3d at 1224. The burden of production then shifts to the employer to articulate a legitimate, non-discriminatory reason for discharging the employee. *See Norton*, 145 F.3d at 118; *Stratton*, 132 F.3d at 879; *Gallo*, 22 F.3d at 1224. The purpose of this step is "to force the defendant to give an explanation for its conduct, in order to prevent employers from simply remaining silent while the plaintiff founders on the difficulty of proving discriminatory intent." *Fisher v. Vassar College*, 114 F.3d 1332, 1335-36 (2d Cir. 1997) (en banc), *cert. denied*, 522 U.S. 1075 (1998).

If the employer articulates a non-discriminatory reason for its employment decision, the presumption of discrimination raised by the *prima facie* case "simply drops out of the picture." *St. Mary's Honor Ctr.*, 509 U.S. at 510-11; *see Stratton*, 132 F.3d at 879; *Fisher*, 114 F.3d at 1336. At this stage, the burden shifts back to the plaintiff to offer proof

"through presentation of his own case and through cross-examination" that would allow a rational factfinder to conclude that the proffered reason was not the true reason for the adverse employment action, and that age was. *St. Mary's Honor Ctr.*, 509 U.S. at 507-08; *see Stratton*, 132 F.3d at 879; *Fisher*, 114 F.3d at 1336. To meet this burden, the plaintiff may rely "on the evidence constituting the prima facie case, together with supportable inferences to be drawn from the false or erroneous character of the employer's proffered reason for the adverse action." *Fisher*, 114 F.3d at 1333. Plaintiff need not prove that age was the only or even the principal factor in the adverse employment action, but only that age was at least one of the motivating factors in that decision. *See Renz v. Grey Adver., Inc.*, 135 F.3d 217, 222 (2d Cir. 1997).

Direct evidence of discrimination is not necessary, *see Luciano v. Olsten Corp.*, 110 F.3d 210, 215 (2d Cir. 1997), because proof is seldom available with respect to an employer's mental processes. Instead, plaintiffs in discrimination suits often must rely on the cumulative weight of circumstantial evidence, since an employer who discriminates against its employee is unlikely to leave a well-marked trail, such as making a notation to that effect in the employee's personnel file. *See Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988). Ordinarily, plaintiff's evidence establishing a *prima facie* case and defendant's production of a nondiscriminatory reason for the employment action raise a question of fact to be resolved by the factfinder after a trial. *See Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995); *Chambers*, 43 F.3d at 38. Summary judgment is appropriate at this point only if the employer's nondiscriminatory reason is dispositive and forecloses any issue of material fact. *See Cronin*, 46 F.3d at 203.

II Analysis

A. *Plaintiff's* Prima Facie *Case*

Carlton has established the first three elements of his *prima facie* case. At age 57 when he was terminated, he was a member of the protected class and qualified for his position. The only remaining question is whether plaintiff showed that his discharge occurred under circumstances giving rise to an inference of age discrimination.

The proof on that issue reveals that upon Carlton's termination his duties were transferred in part to Gounalis, a co-worker, who was 18 years younger than Carlton, and his remaining duties were given to Oravets, an employee 25 years younger, who was hired three months after Carlton was discharged. Generally, a plaintiff's replacement by a significantly younger person is evidence of age discrimination. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 313 (1996). Indeed, we have previously held that a plaintiff has demonstrated an inference of age discrimination and thus established a *prima facie* case in nearly identical circumstances where the majority of plaintiff's responsibilities were transferred to a younger co-worker, and shortly thereafter some of plaintiff's other duties were transferred to a newly hired younger employee. *See Montana*, 869 F.2d at 105 (inference established where plaintiff's duties assumed by co-worker and newly hired employee who were both approximately 30 years younger); *see also Stratton*, 132 F.3d at 879-80 (fact that plaintiff's duties were taken over by individuals 13 and 26 years younger supports inference of discrimination); *Viola v. Philips Medical Sys. of N. Am.*, 42 F.3d 712, 716-17 (2d Cir. 1994) (sufficient inference of discrimination for *prima facie* case where plaintiff's position filled by newly hired younger employee within one year of his termination).

Carlton also alleges that Baldari suggested, during the meeting regarding his termination, that he should "retire," and that this constitutes additional evidence of age discrimination. Although evidence of one stray comment by itself is usually not sufficient proof to show age discrimination, that stray comment may "bear a more ominous significance" when considered within the totality of all the evidence. *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 56 (2d Cir. 1998). Hence, it furnishes support for Carlton's *prima facie* case.

In light of the foregoing, we think plaintiff demonstrated circumstances giving rise to an inference of discrimination, and conclude that Carlton established a *prima facie* case.

B. *Mystic's Defense*

After a plaintiff demonstrates a *prima facie* case of age discrimination, the defendant must produce evidence "which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Ctr.*, 509 U.S. at 509 (emphasis in original). This explanation "must be 'clear and specific.' " *Gallo*, 22 F.3d at 1226 (quoting *Meiri*, 759 F.2d at 997). Mystic has established that it experienced a significant decline in delivery income and profits due to weather conditions, and that a reduction-in-force was necessary to redress the imbalance in its finances. Mystic also avers that it was dissatisfied with Carlton's job performance. These explanations are sufficient to rebut the presumption of age discrimination established by plaintiff's *prima facie* case. *See, e.g., Woroski v. Nashua Corp.*, 31 F.3d 105, 109 (2d Cir. 1994) (company-wide reduction-in-force is valid non-discriminatory reason for discharge); *Gallo*, 22 F.3d at 1226 (same); *Meiri*, 759 F.2d at 997 (employer's unrebutted claim of poor job performance is valid non-discriminatory reason for discharge).

C. *Pretext for Age Discrimination*

Even within the context of a legitimate reduction-in-force, however, an employer may not discharge an employee "because" of his age. *See Gallo*, 22 F.3d at 1226. But Carlton must demonstrate, at least in his individual case, that the reduction-in-force and the allegation of poor performance are actually a pretext and that the real reason for his discharge was his age. *See id.*

Several questions arise regarding Mystic's assertion that Carlton was fired as part of a necessary reduction-in-force. In spite of the company's purported need to downsize, Oravets, who was 25 years younger than the plaintiff, was hired to fill Carlton's position as director of marketing only three months after plaintiff was discharged, tending to refute the reduction-in-force reason for plaintiff's discharge. *See Oxman v. WLS-TV*, 846 F.2d 448, 453 (7th Cir. 1988) ("Unlike the typical discharge case, an employer who terminates employees pursuant to a [reduction-in-force] rarely replaces the employees it let go."). Although Mystic asserts that a newly acquired account warranted the hiring of another employee, its contention does not explain why Mystic did not consider rehiring Carlton for the position. The inadequacy of Mystic's explanation is of some significance since Congress, as earlier noted, found older workers especially disadvantaged in regaining employment after being displaced. *See* 29 U.S.C. § 621(a)(1). Further, Mystic provided another employee with a recall option pending a financial turnaround, but did not extend this option to Carlton. And, defendant achieved relatively insignificant savings as a result of Carlton's termination. While Carlton had received $57,200 per year, Oravets was paid $46,800 per year. All of which suggests that perhaps some other motive—beyond the company's finances—motivated Carlton's dismissal.

Defendants' assertion that Carlton was terminated in part because of poor performance also appears questionable. In its response to the EEOC, Mystic cited its decline in profits as the only reason for Carlton's dismissal, and expressly stated that job performance was not a factor. In fact, Mystic noted in its November 3, 1995 letter to the EEOC that Carlton "was let go for economic reasons. The issue of performance wasn't addressed nor was age the reason for the separation." Yet, in interrogatory responses and depositions taken for the district court litigation, Mystic declared that Carlton was fired for poor job performance. The inconsistency between the justifications offered for Carlton's dismissal in the two proceedings raises a genuine issue of material fact with regard to the veracity of this non-discriminatory reason. *See EEOC v. Ethan Allen, Inc.*, 44 F.3d 116, 120 (2d Cir. 1994) (reasonable jury could infer pretext from discrepancies in employer testimony regarding reasons for termination).

Moreover, during his employment with Mystic, Carlton never received a negative written performance evaluation or formal warning, nor is there any writing whatsoever criticizing his job performance, indicating that as a reason for his firing poor job performance was an afterthought. Although Baldari insists that he was unhappy with Carlton's performance for years, Mystic continued to employ him. Objective evidence indicates that plaintiff was performing his job adequately. He had primary responsibility for increasing delivery income and soliciting new accounts, and with his assistance Mystic's delivery income nearly doubled between 1989 and 1994. He also brought 65 new accounts to his employer.

Defendant responds to plaintiff's arguments by maintaining that it never completes written performance evaluations of its employees, and thus the lack of written evidence is unremarkable. We think there is evidence of inconsistency in

defendant's handling of supposedly underperforming employees. For example, when Oravets was terminated from his first term of employment with Mystic in 1993, the employer filled out a pre-printed form that stated that Oravets' termination was for "insubordination." No such form exists for Carlton. Again, when Oravets was performing poorly during his prior term of employment, his salary was reduced. If Carlton's performance had declined, as defendant insists, it seems surprising that there was no contemporaneous proof of that fact. *Cf. Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 51 (2d Cir. 1998) (inconsistent application of company disciplinary policy sufficient for jury to find that employer's defense was pretext for discrimination).

In light of the dispute in the proof on these issues, a rational jury could reject both of Mystic's non-discriminatory reasons. The conflict between plaintiff's evidence establishing a *prima facie* case and Mystic's proof in support of its non-discriminatory reasons creates genuine issues of material fact that can only be decided by a factfinder after trial. *See Cronin*, 46 F.3d at 203; *Chambers*, 43 F.3d at 38.

D. *Same Actor Inference*

Mystic nonetheless contends that summary judgment properly issued because Carlton's evidence of discrimination is undermined by the "same actor inference." When the same actor hires a person already within the protected class, and then later fires that same person, "it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire." *See Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997). Because Baldari both hired Carlton at 49 and later fired him at age 56, the "same actor inference" applies. Case law teaches that where the termination occurs within a relatively short time after the hiring there is a strong inference that discrimination was not a moti-

vating factor in the employment decision. *See, e.g., id.* at 561 (eight days between hiring and firing provides strong inference); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993) (under two years, still a significant inference); *Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 174-75 (8th Cir. 1992) (less than two years, inference still applies); *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (six months provides for strong inference).

However, the inference is less compelling when a significant period of time elapses between the hiring and firing. *See Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995) ("the length of time between the hiring and firing of an employee affects the strength of the inference. . . . Over the years, an individual may develop an animus towards a class of people that did not exist when the hiring decision was made."). The seven years between Carlton's hiring and firing significantly weakens the same actor inference. Consequently, that inference alone cannot support summary judgment in this case where circumstances could have changed over the course of time. Although Mystic points out that it employs numerous individuals within the protected age group, such evidence is not dispositive. *See Chambers*, 43 F.3d at 38.

CONCLUSION

In sum, we find that Carlton has established a *prima facie* case of age discrimination and that genuine issues of material fact exist regarding the non-discriminatory reasons Mystic has advanced for its decision to discharge him. As a result, summary judgment was wrongly granted. Accordingly, that judgment is reversed and the case remanded to the district court with instructions to reinstate plaintiff's complaint and to conduct further proceedings on the merits of Carlton's ADEA claim consistent with this opinion.

APPENDIX B

Opinion of the United States District Court for the Eastern District of New York (Justice David G. Trager) Dated August 25, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Charles Carlton,
Plaintiff,
- against -
Mystic Transportation, Inc., Mystic Bulk Carriers, Inc. and Leonard Baldari,
Defendants.

96 CV 4063 (DGT)

OPINION

TRAGER, District Judge,

Plaintiff, Charles Carlton, brought this action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. ("ADEA"); the New York State Human Rights Law §296 et seq ("NYSHRL"); and the Administrative Code of the City of New York §9-101 ("NYCHRL"). Plaintiff claimed that he was dismissed from his job in April, 1995, by defendant Baldari, the president and sole shareholder of defendant corporations, because of his age. Defendants disputed that age played any role in plaintiff's dismissal, and instead claimed that plaintiff was laid off during a downturn in business when ten other employees were also terminated. Defendants also stated that though the reason for plaintiff's dismissal was the economic downturn, plaintiff was specifically selected because of his mediocre job performance and not his age.

Mystic Transportation is involved in the transportation of heating oil in the New York City metropolitan area, while Mystic Bulk handles the transportation of other petroleum products, including gasoline, asphalt and jet fuel. The two companies are inextricably intertwined; they are owned by Baldari and have consolidated financial statements. In April, 1995, defendant Baldari terminated plaintiff along with ten other employees as part of a financial retrenchment necessitated by an undisputed economic downturn. Nonetheless, plaintiff claims that his discharge occurred because of his age.

Defendants filed a motion for summary judgment, pursuant to F.R.Civ.P. 56. Plaintiff filed a motion for summary judgment strictly on the issue that defendants did not properly plead the affirmative defense that plaintiff failed to mitigate his damages. Oral argument was held on July 2, 1998, at which time the court granted defendants' motion for summary judgment. This opinion is issued to explain in detail the reasons stated on the record for granting defendants' motion.

Background

Plaintiff was hired as a salesman by Baldari in August, 1988, at the age of forty-nine. Shortly after hiring plaintiff, Baldari appointed plaintiff as the "Director of Marketing" for Defendant corporations. One year prior to plaintiff's termination in April, 1995, Baldari had hired Lydia Gounalis (age 38) to assist in marketing matters, and some time after plaintiff's dismissal, she assumed the position of "Director of Marketing." Three months after plaintiff was terminated, Baldari hired John Oravets (age 31). In June, 1996,

Gounalis's title changed to "Marketing Manager" and Oravets took over the Director of Marketing position.[1]

Discussion

In an age discrimination case, the plaintiff has the burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). To make out a prima facie age discrimination case, the plaintiff must show that: (1) he belongs to the protected class; (2) he was and can continue to perform his duties satisfactorily; (3) he was discharged; and (4) his discharge occurred under circumstances giving rise to an inference of 'discrimination based on his membership in the protected class. See e.g., Grady v. Affiliated Cent., Inc., 130 F.3d 553, 559 (2d Cir. 1997).

Once the plaintiff has established a prima facie case, the burden shifts to the employer to offer a legitimate non-discriminatory explanation for its actions, See Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1992). After the employer has offered such an explanation, if the plaintiff is to survive a motion for summary judgment, he must offer evidence that the stated reasons were a pretext for age discrimination. See Meiri v. Dacon, 759 F.2d 989 (2d Cir. 1985).

In an age discrimination case, a defendant's motion for summary judgment will be granted only if there is a "lack of evidence in support of the plaintiff's position, or the evidence

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[1] It is not clear whether Gounalis's title change was a promotion or demotion. If anything, Gounalis's deposition testimony indicates that she and Oravets worked side-by-side and that neither of them reported to the other. See Gounalis Deposition, Oct. 7, 1997, pp. 73-4.

[is] so overwhelmingly tilted in one direction that any contrary finding would constitute clear error." See Danzer v. Norden Sys., Inc., 1998 WL 455774 *2 (2d Cir. July 15, 1998) (Calabresi, J.) (citations omitted). In this case, plaintiff's evidence of age discrimination is lacking, but, even accepting he has presented some evidence, the record as a whole is so "overwhelmingly tilted" in defendants' direction that a jury's finding for plaintiff "would constitute clear error." Id.

(1)

In his papers plaintiff demonstrated that he satisfied the first three elements of his prima facie age discrimination case. With respect to the fourth element, however, plaintiff has failed to show that he was dismissed under circumstances giving rise to an inference of age discrimination.

Defendants have presented compelling evidence against a finding of such an inference in two arguments relating to their employment statistics and their financial condition at the time of plaintiff's discharge. First, an analysis of the age statistics provided by defendants, and unchallenged by plaintiff, alone constitutes powerful evidence negating an inference of age discrimination. In April, 1995, Mystic Transportation employed 63 people, 27 of whom were over 40, representing 42.8% of the company. Moreover, of those 27, 12 were over 40 when hired. Mystic Bulk employed 204 people, 85 of whom were over 40, representing 42% of the company, and 66 of those were over 40 when hired. On the other hand, of the eleven persons terminated in April, 1995, eight were under 40 while only three, or 27%, were over 40.

Second, defendants also provided unrefuted evidence that during the winter preceding plaintiff's termination, mild weather conditions resulted in a significant decrease in

defendants' business and profits as compared to the prior year's winter and the one that preceded it. This evidence is especially significant because defendants' business is a cyclical one that derives a disproportionate part of its yearly profits from heating oil transportation conducted during the first financial quarter. Citing statistics published in the New York Times, defendants demonstrated that the number of "degree days," which is the standard measure of temperature levels relevant to the oil heating industry, in the winter of 1994/1995 was 4,095, whereas it had been 4,879 in 1993/1994 and 4,722 in 1992/1993. Thus, degree days had dropped roughly 20% in 1994/1995, and this drop resulted in greatly decreased first quarter profits of $584,108, as compared to first quarter profits in the prior two years, $1,968,848 and $1,562,188. Having suffered a profit shortfall of $1,400,000 in 1995, defendants claim, again without contradiction, they would have had great difficulty in repaying their $1,500,000 line of bank credit. Defendants, therefore, sought to reduce operating costs, in among other ways, by cutting payroll expenses. Plaintiff, along with the ten other employees, was terminated.[2]

Seeking to overcome these employment and financial statistics, plaintiff claims that the fact that defendants "replaced" him after his termination raises the inference that his dismissal was motivated by age discrimination. If, as plaintiff alleges, defendants hired a younger person at a reduced salary to perform plaintiff's job, this fact might give rise to such an inference, but confronted with defendants' otherwise compelling employment statistics, it would be a

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[2] Defendants stated that discharging the eleven employees resulted in a savings of $400,000, to which they added "additional insurance and operation changes [which] saved $200,000." Again, plaintiff does not controvert these latter cost reductions.

weak inference at best. Plaintiff's evidence, however, is simply insufficient to permit a reasonable juror to conclude that plaintiff was replaced after his termination.

Plaintiff first argues that he was replaced by Gounalis, age 39, who did, in fact, take over plaintiff's position as marketing director after he was fired. Gounalis, however, was hired by defendants nearly one year before plaintiff's termination, during an economic season, as described below, see discussion, part (2), that was much rosier than that existing in April, 1995. Plaintiff has not and cannot controvert the fact that Gounalis was hired well before plaintiff was fired and the mere fact that a younger person assumed plaintiff's title and some of his responsibilities after he was dismissed cannot, without more[3], give rise to an inference of age discrimination.[4]

Second, plaintiff points to the fact that Baldari hired Oravets, age 31, three months after plaintiff's dismissal as evidence that defendants replaced him with a younger worker. Indeed, Oravets took over some of plaintiff's former job duties, but the remainder of the accounts continued to be managed by Gounalis and Baldari. See Oravets Deposition,

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[3] The "more" that plaintiff has presented is limited to one isolated remark made by Baldari to plaintiff at the time of his dismissal. See Discussion, part (2).

[4] Though plaintiff seeks to downplay the costs savings occasioned by his termination, see discussion, part (2), the fact that defendants could conduct their marketing operations by employing Gounalis alone (with Baldari's assistance) at a salary of $42,000, rather than both Gounalis and plaintiff, costing $99,000, gives more than minimal support to defendants' claim that plaintiff's firing was an effective way to reduce operating expenses.

Oct. 7, 1997, p. 49 ("Q: Now aside from the asphalt and cement business, you were given some oil business or gasoline business? A: Uh-Huh. Q: What were you given? A: Texaco, Shell, Sunoco and Hess, Merit."); Gounalis Deposition, Oct. 7, 1997, pp. 71-72 ("Q: So Mr. Oravets then took over the relationships with all the major [oil] companies or some of them? A: No, just two of them. Q: Which ones? A: Texaco and Sunoco . . . . those two accounts require almost no maintenance . . . you just go and say hello once a month. Q; It didn't take much work at all to handle those accounts? A: No."); Baldari Affidavit, ¶26 ("At the time I terminated plaintiff, I did not contemplate hiring Mr. Oravets. I took over all of the plaintiff's duties. . . . Mr. Oravets did not replace Mr. Carlton. He took over my responsibilities in one area of our business and assisted me in marketing."). Eventually, Oravets also took over plaintiff's former title of Director of Marketing.

In response to plaintiff's contention that he was replaced by Oravets, defendants present several arguments, which taken together, do not permit a reasonable jury to find that Oravets "replaced" plaintiff after his dismissal. First, Oravets was hired a full three months after plaintiff was fired. Second, even ignoring Baldari's denial, plaintiff has not provided a shred of direct or circumstantial evidence that this hiring was effected pursuant to some preplanned scheme to replace plaintiff. Third, even if three months after plaintiff's termination, Oravets had specifically taken over plaintiff's prior position, defendants stated - and plaintiff does not controvert - that a new business development required the hiring of an additional marketing employee. Immediately prior to Oravets's hiring and well after plaintiff's discharge, Baldari secured a large new account, when an existing client expanded through a take-over, which would occupy a significant portion of the time he otherwise was spending on general marketing matters. See Baldari Deposition, Dec. 2,

1997, pp. 46-48 ("Q: When was [Mr. Oravets] hired? A: He was hired in August or September [1995], after we succeeded in - I succeeded in putting in a very large oil account, which probably would rough us up 20 percent, 40 percent on the transportation corporation. . . . Q: It was after that that you decided to hire Mr. Oravets? A: Yes. . . . Q: What was the reason that you wanted to hire him? A: Because I felt he had a lot of potential. I felt that I could use the help, and with the added business being put on, things were looking very good."). Fourth, defendants contend that Oravets was hired because of specific-unique contributions he could make to defendants' marketing efforts. Oravets, unlike plaintiff, had received formal academic marketing training, and, more significantly, had extensive contacts in the dry powder cement business, an industry into which Baldari wanted to expand as a hedge against the cyclical weather-dependent nature of defendants' heating oil business. See Baldari Affidavit, ¶¶25-26 (Oravets "did not replace the plaintiff. He was hired to develop a new area of our business - dry cement deliveries. . . . [He] had a marketing degree and a background in construction. He developed that business for us, which plaintiff could not, or just would not, do."). The uncontroverted evidence showed that subsequent to Oravets's hiring, defendants' dry powder cement business did, in fact, expand substantially, tripling within six months, and increasing ninefold in two years.

The only piece of evidence that plaintiff could muster to show that Oravets replaced him was that Oravets took over several of plaintiff's accounts. This, plaintiff contends, undercuts defendants' asserted explanation for Oravets's hiring. Assuming its truth, however, this fact is not sufficient, given all the surrounding circumstances, for a reasonable jury to find that Oravets replaced plaintiff. One, there is nothing unusual or indicative of age discrimination in the mere fact that in a relatively small, privately owned company,

employees are required to assume multiple responsibilities. The boundaries among job duties in such companies are frequently less than sharply drawn. That Oravets, Gounalis, and Baldari assumed some or all of plaintiff's obligations demonstrates little more than the ordinary manner in which small companies, such as defendants' with a "marketing department" of less than three persons, including the owner, operate. See Baldari Deposition, Dec. 2, 1997, pp. 15-16 ("It's my company. I'm the director of marketing. I've washed the toilet. I sweep the floors. I evaluate my people. I don't have a barrage of people around me in management. . . . [Carlton] assists me. I'm the - I'm the marketing man. It's my company. . . . [Carlton] would assist me."). Two, and more significantly, plaintiff presented no evidence to refute defendants' claim that Oravets was hired principally to develop the dry powder cement business, and that he did so to a great degree. In light of defendants' evidence, which indicates that though Oravets's job partially overlapped with plaintiff's position, it encompassed significant additional duties, no reasonable jury could find that Oravets replaced plaintiff.

(2)

Assuming arguendo that plaintiff has somehow succeeded in making out a prima facie case of age discrimination, he failed to rebut defendants' non-discriminatory explanation for his termination, namely, that economic conditions necessitated a reduction in operating costs.

In an effort to show that defendants' explanation for plaintiff's dismissal was a pretext for discrimination, plaintiff argues that an alleged comment by Baldari at the time plaintiff was fired demonstrates that defendants were concerned with plaintiff's age and not economic conditions.

Plaintiff claims that Baldari asked plaintiff into his office and told him that "he wanted him to 'retire' and . . . [that his] termination was for financial reasons." Plaintiff's Memo. of Law, p. 4.

Assuming that Baldari did, in fact, suggest that plaintiff retire, in light of all other facts present in this case, again no reasonable juror could conclude that plaintiff's age, and not defendants' proffered non-discriminatory reason, was the reason or even a motivating factor for plaintiff's termination. First, on its face, the suggestion that an employee retire, made just prior to that employee's dismissal for economic reasons, is at best ambiguous and hardly proof that age was relevant to the firing decision.[5] A suggestion to retire might just as easily be interpreted as Baldari's way of attempting to soften an unpleasant message and avoid a confrontational dismissal, especially when it is combined, as plaintiff concedes, with a statement concerning economic difficulties, which undoubtedly plaintiff - as a member of a committee that drew up the initial termination "hit list" - knew very well was the case. It is difficult to conceive of how Baldari's suggestion leads to the conclusion that Baldari thought plaintiff too old and decided to terminate him on that basis. But, even if Baldari intended to refer to plaintiff's age, as a matter of law, this one single stray comment is not sufficient to warrant a finding that age discrimination motivated the employment decision.[6]

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[5] This is especially the case, where as here, there is no claim that an employee retirement plan or other benefits plan would be affected depending on whether plaintiff voluntarily retired or was involuntarily dismissed.

[6] See Raskin v. Wyatt Co., 125 F.3d 55, 58 & 63 (2d Cir. 1997) (summary judgment for employer affirmed on ADEA claim where employer had stated to plaintiff that he

This conclusion is especially justified where the plaintiff was within the ADEA's protected class, 49, when he was hired and then was fired by the very same person who hired him - Baldari. See Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997) (in suit for discrimination under the

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"assumed that [plaintiff] did not want to be office manager so late in his career" and that he was concerned that plaintiff might choose to retire, and, therefore, "might not remain with [defendant] long enough to learn the [new] job," the court ruled that these comments were insufficient to rebut defendant's proffered reasons for not promoting plaintiff, under both the Price Waterhouse v. Hopkins mixed motive an McDonnell Douglas Corp. v. Green burden shifting analyses, holding that "[t]he ADEA does not make all discussion of age taboo" and these comments "do not reflect discriminatory animus, or show that [plaintiff's] age 'was in fact a 'motivating' or 'substantial' factor in the employment decision'") (quoting de la Cruz v. New York City Human Resources Admin. Dep't of Soc. Servs., 82 F.3d 16 (2d Cir. 1996)); Woroski v. Nashua Corp., 31 F.3d 105, 108 & 110 n.2 (2d Cir.994) (where employer was alleged to have stated that salaried employees "had been around too long, made too much money and enjoyed too many benefits" and that the "company needed . . . new younger people . . . that were . . . more aggressive . . . and in fact could be hired for . . . half or 70%" of what older workers earned, the court granted employer's motion for summary judgment and stated that these statements merely "indicate a concern for unjustifiably higher costs associated with employees having greater seniority" and "[t]he ADEA does not prohibit an employer from acting out of concern for excessive costs, even if they arise from age-related facts"); Gagne v. Northwestern Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989) (solitary remark by immediate supervisor, that he "needed younger blood," insufficient to defeat summary judgment motion).

ADEA, court noted that "when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire"); Deydo v. Baker Eng'g New York, Inc., 1992 U.S. Dist. Lexis 132, at *18 (S.D.N.Y. Jan. 13, 1998) (being hired while already a member of the protected class "militates against any finding of age animus").

Second, plaintiff argues that defendants' statement that plaintiff was selected to be fired because of poor job performance was also a pretext for age discrimination. In defendants' legal memorandum and EEOC filings, however, defendants made clear that they never claimed that plaintiff was fired because of his job performance, only that it played a role when it came time to make cuts. When an employer needs to make bona fide cost reductions, it should be able to employ any reasonable business criteria it wishes in making a termination decision and a court should not second-guess the employer's judgment without more powerful direct or circumstantial evidence that the selection was due to age. Though the record suggests that plaintiff had been a valued employee, it is bereft of evidence that would require a court to second-guess defendants' determination that other employees were more valuable to the company than plaintiff and that he should be one of the employees dismissed.

In addition, it should be noted that since plaintiff was on of at most three employees performing marketing functions, it would undoubtedly have been very difficult for defendants to compare plaintiff's performance on a more objective basis to that of other employees holding different jobs, with their

attendant distinct and varied responsibilities, functions and roles, when making the decision to fire plaintiff.[7]

Third, plaintiff argues that, contrary to defendants' assertion that plaintiff was fired to reduce costs in a time of financial crisis, firing him actually resulted in an insignificant reduction of operating expenses. Plaintiff asserts that prior to his termination he earned a yearly salary of $57,000, and Oravets, who was hired three months later, earned a salary of $46,000, resulting in a savings of only $11,000 from plaintiff's dismissal. Though technically accurate, plaintiff's argument once again conclusorily assumes that Oravets was hired to replace him, but more importantly, it fails to account for the fact that ten other employees were fired along with plaintiff. In light of the total savings resulting from the elimination of eleven jobs, the rehiring of Oravets did not significantly undermine defendants' effort to cut $400,000 in salaries. In addition, even if there was only an $11,000 savings after Oravets was hired, by this time, the company's prospects had improved.[8]

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[7] It should be noted that if plaintiff's job performance were as stellar as he argues, it would have been illogical for defendants to choose to fire an employee who contributed so significantly to the firm, instead of one or two others who were making less significant contributions.

[8] Plaintiff also claims that when he was terminated defendants had purchased several "luxury" cars, in spite of the purported financial crisis existing at that time. Defendants responded, unchallenged by plaintiff, that the supposed purchases of automobiles were actually leases of three automobiles, which were paid out over a period of between 2 1/2 and 4 years, and were among roughly ten vehicles leased by defendants in the ordinary course of business. Plaintiff's claim that defendants' continuing to lease cars is evidence

Fourth, plaintiff contends that defendants' financial condition was unchanged when it hired Oravets, and if Oravets was hired to perform similar functions as plaintiff, his hiring casts doubt on a financial crisis as the reason for plaintiff's dismissal. To support this theory plaintiff cites the deposition testimony of a Mr. Hiller, defendants' CFO, who stated that at the time Oravets was hired, defendants' financial problems were unchanged, "[o]ther than cost cutting measures,' i.e., the discharge of 11 employees. As discussed above, however, defendants stated that after plaintiff was dismissed, Baldari succeeded in recruiting a large new account, Stuyvesant, and as a result Baldari's ability to continue assisting Gounalis in performing plaintiff's tasks was compromised. Furthermore, Oravets was hired because of his contacts and expertise in the dry powder cement business. Indeed, after Oravets came on board, revenues in the dry powder cement business tripled.

Fifth, plaintiff attempts to refute defendants' explanation for his discharge by identifying an apparent inconsistency in Baldari's description of the new client, once referred to as Original Customers and, on a second occasion as Stuyvesant, and in that manner show that defendants' claims were not genuine. Defendants' clarification of this apparent inconsistency, that Original Customers was taken over by another company entitled Stuyvesant, however, is unrefuted.

Plaintiff's last argument that defendants' reason for his discharge was a pretext for age discrimination is that the other ten employees discharged along with plaintiff held low-level positions, as compared to his own. Defendants correctly argue that during times of lay-offs employees from all job levels may be terminated, depending on whether their

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that defendants' proffered explanation for his discharge is a pretext for age discrimination borders on the absurd.

services are needed. Indeed, it would seem strange if only low level employees were discharged during a reduction in force. A court is not in a position to decide whether defendants' business judgment was unsound.

In sum, having reviewed plaintiff's papers and listened to plaintiff's contentions at oral argument, there was simply no justification for submitting this case to a jury. Support for his claim consists of two factors: Baldari's ambiguous statement and plaintiff's "replacement" by Oravets. Even assuming, for purposes of plaintiff's prima facie case, that Baldari did, in fact, ask plaintiff to retire and that Oravets's hiring in some manner constituted a "replacement" of plaintiff, this evidence is rendered completely toothless by defendants' non-discriminatory explanations for plaintiff's discharge. First, Baldari's alleged statement is, as a matter of law, insufficient to show discriminatory animus. Second, whatever minimal probative value could be afforded to the fact that Oravets took over some of plaintiff's accounts, the undisputed evidence is that Oravets had the background to assist defendants in expanding into the less volatile dry cement business, and that he succeeded in doing so. Furthermore, plaintiff's proof - such as it is - is completely overwhelmed by defendants' presentation of employment and financial statistics, which showed both that defendants employed (and continued to employ after the reduction in force) a large number of persons over 40 years of age and that a significant economic downturn necessitated not only plaintiff's dismissal, but also that of ten other employees, seven of whom were under 40.

Thus, plaintiff has presented two extremely weak pieces of evidence, which, individually or in combination, do not warrant presentation to a jury. See Woroski v. Nashua Corp., 31 F.3d 105, 110 (2d Cir. 1994) ("a plaintiff opposing such a motion [for summary judgment] must produce sufficient

evidence to support a rational finding that the legitimate, nondiscriminatory reasons proffered by the employer were false, and that more likely than not the employee's age was the real reason for the discharge"). The evidence presented does not support an inference of age discrimination or a finding that defendants' proffered reasons for plaintiff's discharge were pretextual. In Judge Calabresi's words, the evidence is "overwhelmingly tilted" in defendants' favor. See Danzer v. Norden Sys., Inc., 1998 WL 455774 (2d Cir. July 15, 1998).

Conclusion

For the reasons stated above, defendants' motion for summary judgment was granted. Plaintiff's cross-motion is denied as moot.

Dated: Brooklyn, New York
August 25, 1998

SO ORDERED:
/s/
DAVID G. TRAGER
United States District Judge

Order of the United States District Court for the Eastern District of New York (Justice David G. Trager) Dated July 2, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Charles R. Carlton,
Plaintiff,
- against -
Mystic Transportation, Inc., Leonard Baldari and Mystic Transportation, Inc. Profit Sharing Plan,
Defendants.

ORDER

Civil Action No.
CV-96-4063 (DGT)

TRAGER, J.

Defendants moved for summary judgment. Upon due consideration of the papers and after a hearing, it is hereby

ORDERED that the motion is granted for the reasons set forth on the record. The Clerk of the Court is directed to enter judgment in favor of the defendants and close the case.

Dated: Brooklyn, New York
July 2, 1998

SO ORDERED:
/s/
DAVID G. TRAGER
United States District Judge

Judgment of the United States District Court for the Eastern District of New York Dated July 8, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Charles R. Carlton,
Plaintiff,
- against -
Mystic Transportation, Inc.,
Leonard Baldari and
Mystic Transportation, Inc.
Profit Sharing Plan,
Defendants.

JUDGMENT
96-CV-4063 (DGT)

An order of Honorable David G. Trager, United States District Judge, having been filed on July 8, 1998, granting the defendants' motion for summary judgment, and closing the case; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendants; and, that the defendants' motion for summary judgment is granted.

Dated: Brooklyn, New York
July 8, 1998

/s/
ROBERT C. HEINEMANN
Clerk of the Court

APPENDIX C

Decision of the United States Court of Appeals for the Second Circuit Dated December 20, 1999

1999 U.S. App. LEXIS 34238

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

KEVIN WALSH,
Plaintiff-Appellant, 99-7764

- v. -

UNITED CABLE TECH SVCS CORP &
TELECOMMUNICATIONS INC.,
Defendant-Appellee.

December 20, 1999, Decided

PRIOR HISTORY: Appeal from the United States District Court for the District of Connecticut (Eginton, J.).

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff appealed from the judgment of the United States District Court for the District of Connecticut granting summary judgment in favor of defendant in plaintiff's age discrimination action.

OVERVIEW: Defendant hired a younger person as general manager and terminated plaintiff employee. The trial court granted summary judgment in favor of defendant employer in plaintiff's age discrimination action under the Age

Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq. On appeal, plaintiff argued that the trial court erred by failing to recognize that the reasons offered by defendant for its employment action were a mere pretext for age discrimination. The court found that defendant articulated two legitimate nondiscriminatory business reasons for its employment action: that plaintiff's termination was a result of a division-wide reorganization; and that the general manager was selected because she was better qualified for the position. Plaintiff failed to establish that defendant's reorganization was a sham. Additional, plaintiff did not meet his burden of proving that defendant's business decision to hire a younger person was so lacking in merit as to call into question its genuineness.

OUTCOME: Summary judgment was affirmed because defendant articulates two legitimate nondiscriminatory business reasons for its employment action and plaintiff failed to meet his burden of proving that the proffered reasons were a mere pretext.

CORE TERMS: age discrimination, burden of proving, prima facie case, proffered reason, reorganization, genuineness, interview, pretext

Federal Statutes

Claims under the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq., follow the same three-step burden-shifting framework as Title VII claims, as set forth in McDonnell Douglas Corp. v. Green. A plaintiff must first establish a prima facie age discrimination case by demonstrating (1) that he belongs to the protected age group, (2) that he was qualified for the position in question, (3) that he suffered an adverse employment action, and (4) that the action occurred in circumstances giving rise to an inference of discrimination. If a prima facie case is established, the

defendant must proffer a legitimate, non-discriminatory business reason for the employment action. If the defendant articulates an age-neutral reason, then the plaintiff bears the burden of proving that the proffered reason is mere pretext and that age was the real reason for the employment action.

COUNSEL: APPEARING FOR APPELLANT: IGOR I. SIKORSKY, Jr., Wethersfield, CT (John N. Tieman, Law Office of Igor I. Sikorsky, Jr., P.C., on the brief).

APPEARING FOR APPELLEE: MARGARET J. STRANGE, Hartford, CT (James F. Shea, Jackson, Lewis, Schnitzler & Krupman, on the brief).

JUDGES: PRESENT: HON. WILFRED FEINBERG, HON. DENNIS JACOBS, HON. ROBERT A. KATZMANN, Circuit Judges.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment be **AFFIRMED.**

Kevin Walsh appeals from the judgment of the United States District Court for the District of Connecticut granting summary judgment in favor of United Cable Technologies Services Corporation and Telecommunications, Inc. ("TCI") in Walsh's age discrimination action. See *Walsh v. United Cable Techs. Servs. Corps. & Telecomms., Inc.*, 46 F. Supp. 2d 170 (D. Conn. 1999). In 1995, TCI hired Carlene McFadyen, age 33, as General Manager instead of Walsh, age 54. On appeal, Walsh argues that the district court erred by failing to recognize that the reasons offered by TCI for its employment action were mere pretext for age discrimination.

We review the district court's grant of summary judgment de novo. See *Young v. County of Fulton*, 160 F.3d 899, 902 (2d Cir. 1998). Claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), follow the same three-step burden-shifting framework as Title VII claims, as set forth in *McDonnell Douglas Corp v Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), See *Viola v. Philips Med. Sys*, 42 F.3d 712, 715-16 (2d Cir. 1994). A plaintiff must first establish a prima facie age discrimination case by demonstrating (1) that he belongs to the protected age group, (2) that he was qualified for the position in question, (3) that he suffered an adverse employment action, and (4) that the action occurred in circumstances giving rise to an inference of discrimination. See *Woroski v. Nashua-Cqrp*, 31 F.3d 105, 108 (2d Cir. 1994). If a prima facie case is established, the defendant must proffer a legitimate, non-discriminatory business reason for the employment action. See id. If the defendant articulates an age-neutral reason, then the plaintiff bears the burden of proving that the proffered reason is mere pretext and that age was the real reason for the employment action. See *Norton v. Sam's Club*, 145 F.3d 114, 120 (2d Cir. 1998).

TCI disputes whether Walsh made out a prima facie case, but for purposes of this appeal we will assume that Walsh met this initial de minimis burden and that the burden shifted to TCI. As the district court correctly stated, TCI "has articulated two legitimate nondiscriminatory business reasons for its employment action: (1) Walsh's termination was a result of a division wide reorganization; and (2) McFadyen was selected because she was better qualified for the position, with a communications degree and a record of strong performance." *Walsh*, 46 F.Supp. 2d at 173.

(1) Walsh failed to establish that TCI's reorganization was a sham. His claim that the circumstances of his interview

demonstrate age discrimination amounts to nothing more than "unsupported assertions" and "conjecture or surmise." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). The circumstance that his interview "lacked substance and professionalism" raises no issue of fact that is material to alleged discrimination based on age. See *Norton*, 145 F.3d at 120 ("The ADEA does not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating, for firing people on account of their age.").

(2) As to TCI's proffered reason that McFadyen was the better candidate, Walsh must do more than show that TCI made a poor choice. He must demonstrate that TCI's selection of McFadyen was "so lacking in merit as to call into question its genuineness." See *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1116 (2d Cir. 1988). Although Walsh introduced evidence indicating he had more experience than McFadyen and marginally superior performance evaluations, McFadyen had a degree in communications, and a strong employment record that (unlike Walsh's) was untainted by written warnings or reprimands. It is clear from our review of the record that Walsh did not meet his burden of proving that TCI's business decision to hire McFadyen was "so lacking in merit as to call into question its genuineness." Id.

For the reasons set forth above, the judgment is hereby **AFFIRMED.**

APPENDIX D

Decision of the United States Court of Appeals for the Second Circuit Dated October 29, 1999

1999 U.S. App. LEXIS 28455

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN TUTKO,
Plaintiff-Appellant, 98-9663

- v. -

JAMES RIVER PAPER CO., INC.,
Defendant-Appellee.

October 29, 1999, Decided

SUBSEQUENT HISTORY: Reported in Table Case Format at: 1999 U.S. App. Lexis 36114.

PRIOR HISTORY: Appeal from the United States District Court for Connecticut (Covello, Chief Judge).

DISPOSITION: AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff appealed decision of United States District Court for District of Connecticut granting summary judgment for defendant on claim brought in connection with plaintiffs termination under Age Discrimination in Employment Act, 29 U.S.C.S § 621 et seq., as well as granting summary judgment for defendant on various state law claims.

OVERVIEW: Plaintiff sued defendant employer under the Age Discrimination in Employment Act, 29 U.S,C.S, § 621 et seq., alleging that his termination constituted unlawful age discrimination. Plaintiff also sued under various state law theories. Plaintiff appealed the district court's decision granting summary judgment for defendant on all claims. The court upheld the district court, finding first that defendant had articulated a legitimate nondiscriminatory reason for plaintiff's termination, as the termination was pursuant to a reduction-in-force. Subsequently, the court found that plaintiff had not met his burden under the applicable McDonnell Douglas framework of showing that defendant's proffered reason was a pretext. This was so because plaintiff relied on inadmissible statistics and mere conjecture and surmise, leading the court to conclude that a properly instructed jury could not find in plaintiff's favor. The court also concluded that plaintiff's state law arguments on appeal were without merit.

OUTCOME: District court's grant of summary judgment for defendant on all claims affirmed; plaintiff's reliance on inadmissible statistics and mere conjecture and surmise in an effort to rebut defendant's proffered legitimate business reason for plaintiff's termination dictated that summary judgment be granted for defendant on the age discrimination claim.

CORE TERMS: age discrimination, non-discriminatory, termination, summary judgment, reduction in force, granting summary judgment, burden of persuasion, prima facie case, state law, conjecture, conclusory, surmise, weaker, accountant, terminated, younger, at-will, staff

COUNSEL: APPEARING FOR APPELLANT: FRANCIS D. BURKE, Mangines & Mangines, Bridgeport, CT.

APPEARING FOR APPELLEE: MARK R. KRAVITZ, Wiggin & Dana, New Haven, CT.

JUDGES: PRESENT: Honorable Pierre N. Leval, Honorable Jose A. Cabranes, Honorable Rosemary S. Pooler, Circuit Judges.

OPINION: SUMMARY ORDER

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is **AFFIRMED.**

Plaintiff James Tutko appeals from the District Court's decision of September 29, 1998 granting summary judgment in favor of defendant James River Paper Company Inc. ("James River") and dismissing his claim for discrimination in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Tutko also appeals from the District Court's decision of November 12, 1998 granting summary judgment in favor of James River and dismissing his state law claims for the intentional infliction of emotional distress, breach of implied contract, promissory estoppel, and breach of the covenant of good faith and fair dealing.

In early spring 1993 James River announced losses of $427 million. As a result James River instituted a general reduction in force. On September 2, 1993, Tutko was informed that his staff accountant's position was being eliminated and he was being terminated. At the time he was 54 years old. A younger staff accountant, Mr. Mongelli, was retained. The record shows that Tutko was an employee at-will.

The District Court held that Tutko had met his minimal initial burden to establish a prima facie case of age

discrimination under the four-part test enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). Tutko is over 40 years old, he was qualified for the surviving position, he was discharged from his employment, and a younger employee, not within the protected class, was retained in preference to him. See, e.g., *Fisher v. Vassar College*, 114 F.3d 1332, 1335 (2d Cir. 1997) (en banc); *Raskin v. Wyatt Co.*, 125 F.3d 55, 63-64 (2d Cir. 1997), Once an ADEA plaintiff has thus established a prima facie case, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment decision. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-507, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993). The ultimate burden of persuasion, however, remains at all times with the plaintiff. See Fisher, 114 F.3d at 1335.

The district court correctly found that James River had articulated a legitimate, non-discriminatory reason for its decision not to retain Tutko. A reduction in force is a legitimate non-discriminatory reason for termination. See, e.g., *Parcinski v. Outlet Co.*, 673 F.2d 34, 36-37(2d Cir. 1982) ("The [ADEA] does not forbid essential corporate belt-tightening having no discriminatory motivation. . . . The [ADEA] does not authorize the courts to judge the wisdom of a corporation's business decisions."). Moreover, as the district court recognized, there is ample evidence in the record that Tutko was the weaker performer of the two employees considered for termination. James River was entitled to compare the two employees and to conclude, as it did, that "Mongelli has a higher level of skills, capabilities and performance than does Tutko." Neither the Court, nor a jury, sits as a "super-personnel department" to reexamine an entity's decisions on the usefulness to the enterprise of an at-will employee. *Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir.

1997) (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986)).

Once James River came forward with a non-discriminatory reason for his termination, the burden of persuasion was on Tutko to show that the adverse action against him was in fact motivated by impermissible age discrimination. See Fisher 114 F.3d at 1337; see also Norton v. Sam's Club, 145 F.3d 114, 120 (2d Cir. 1998) ("ADEA does not make employers liable for doing stupid or even wicked things; it makes them liable for discriminating, for firing people on account of their age."). The crux of Tutko's argument on appeal is that he has produced sufficient evidence to get to a jury on this claim that the real reason for his termination was his age.

We disagree. Summary judgment against a plaintiff in an employment discrimination case is appropriate if the plaintiff offers only "unsupported assertions," "conjecture or surmise," or "conclusory statements" to support an essential element of his case. *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir., 1995). Rather, to survive a motion for summary judgment the plaintiff must produce "sufficient evidence to support a rational finding" in its favor. *Woroski v. Nashua Corp.*, 31. F.3d 105, 109-110 (2d Cir. 1994). A plaintiff may rely only on admissible evidence. See *Raskin*, 125.F.3d at 66. Here, Tutko variously relies on inadmissible statistics, conclusory affidavits and mere conjecture and surmise. We find nothing in the record that would allow a properly instructed jury to find in Tutko's favor. The evidence is overwhelming that Tutko was terminated during a reduction in force because his performance was weaker than the other candidate for retention. Nothing in the record supports the claim that Tutko's dismissal was tainted by age discrimination. Summary judgment for James River was therefore appropriate.

We have considered plaintiff's other arguments on appeal regarding his state law claims and we find them to be without merit.

APPENDIX E

Decision of the United States Court of Appeals for the Tenth Circuit Filed February 17, 2000

2000 U.S. App. LEXIS 2479

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JANE C. STURDIVAN,
Plaintiff-Appellant, 98-6412

- v. -

TRI-STATE FEEDERS, Inc.,
Defendant-Appellee.

February 17, 2000, Filed

PRIOR HISTORY: (W.D. Okla.) (D.C. No. CV-98-48-M).

DISPOSITION: Judgment of the United States District Court for the Western District of Oklahoma AFFIRMED.

CASE SUMMARY

PROCEDURAL POSTURE: In an unpublished opinion, plaintiff appealed from the United States District Court for the Western District of Oklahoma, which granted summary judgment on discrimination claims under 42 U.S.C.S. § 2000e et seq., and the Age Discrimination in Employment Act, 29 U.S.C.S. §§ 621-634.

OVERVIEW: At the summary judgment stage, it was plaintiff's burden to show a genuine issue of material fact as to whether defendant's proffered reason for her termination

was pretextual. That a male employee replaced her was an element of her prima facie case, but not evidence that defendant's reasons for firing her were not believable. Defendant's manager testified that he wanted to retain an employee who was of greater value to the company, This was no more than a simple business decision, which courts would not second-guess. Plaintiff also failed to show pretext by such implausibilities, inconsistencies, or contradictions in defendant's proffered, legitimate reasons for terminating her that a reasonable fact finder could rationally find unworthy of credence and thus infer that defendant did not act for the asserted nondiscriminatory reasons. The evidence reflected that it was plaintiff's unacceptable behavior, and particularly the potential departure of a more valuable employee, that caused her termination. Mere conjecture that defendant's explanation was a pretext for intentional discrimination was an insufficient basis for denying summary judgment.

OUTCOME: Affirmed because plaintiff failed to show a genuine issue of material fact as to whether defendant's proffered reason for her termination was pretextual.

CORE TERMS: termination, prima facie case, replaced, summary judgement, gender, male, vendors, younger, pretextual, subordinate, quit, genuine issue of material fact, proffered reason, pretext, terminating, co-workers, customer, grain, nondiscriminatory reason, reasonable jury, office manager, nondiscriminatory, twenty-four, discharged, nonmovant, unworthy of belief, telephone system, oral argument, replacement, terminated

COUNSEL: For JANE C. STURIVAN, Plaintiff-Appellant: Phyllis L. Walta, Walta & Walta, Enid, OK.

For TRI-STATE FEEDERS, INC., Defendant-Appellee: Kevin R. Donelson, Tracy A. Poole, Fellers, Snider,

Blankenship, Bailey & Tippens, Oklahoma City, OK.

JUDGES: Before BRORBY, PORFILIO, and LUCERO, Circuit Judges.

OPINION BY: CARLOS F. LUCERO

OPINION: ORDER AND JUDGMENT[1]

Plaintiff appeals an adverse summary judgment ruling on her employment discrimination claims based on gender under Title VII, 42 U.S.C. §§ 2000e to 2000e-17, and age under the Age Discrimination in Employment Act, 29 U.S.C.§§ 621-634 (ADEA).[2] She contends that following her termination as office manager with defendant feedlot operation, she was replaced by a twenty-four year old male employee. At the time of her termination, plaintiff was fifty-nine. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review the district court's grant of summary judgment de novo. Accordingly, we review the record and all reasonable inferences in a light most favorable to the moving party. We will uphold the district court's decision only if no genuine

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[2] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

issues of material fact exists and the prevailing party is entitled to judgment as a matter of law. A mere scintilla of evidence supporting the nonmovant does not create a genuine issue of material fact; rather, the nonmovant must present facts from which a reasonable jury could find in its favor. See *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1175 (10th Cir. 1999); see also Fed. R. Civ. P 56 (e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.").

The day before her termination, the general manager (Walter Olsen) took the office accountant (Dane Morris) with him to help fix problems with the telephone system. Mr. Morris was plaintiff's subordinate. According to plaintiff, Mr. Olsen stated he was taking Mr. Morris because Mr. Morris probably would know more about the telephone system than plaintiff did. See Appellant's App. at 39. Plaintiff admitted she was disturbed by the fact that Mr. Morris had not informed Mr. Olsen that plaintiff was the one who had showed Mr. Morris the telephone hookups. See id. at 39-41. Mr. Morris described plaintiff as being upset all afternoon. See id. at 63. After he informed Mr. Olsen he could not work there any longer, Mr. Olsen decided to terminate plaintiff. See id. at 66, 99-100.

According to Mr. Olsen, he fired plaintiff because he considered her to be a general problem, specifically that grain vendors "didn't want to deal with her," that subordinates had unnecessary conflicts, that Mr. Morris had threatened to quit because of his inability to get along with plaintiff, and, because of "the kind of relationship [plaintiff] had with all co-workers," Mr. Olsen envisioned having to replace

"whoever I replaced Dane with." See id. at 99. Mr. Olsen further testified that plaintiff had been rude to him and he had received complaints about her from vendors and customers. See id. at 100-01. Several people who worked under her also complained. See id. at 107.

In order to establish a prima facie case of gender discrimination, plaintiff was required to show that: "(1) she belonged to the protected class; (2) she was adversely affected by the decision [to terminate her employment]; (3) she was qualified for the position...; and (4) she was treated less favorably than her male counterparts." *Cole v. Ruidoso Municipal Sch.*, 43 F.3d 1373, 1380 (10th Cir. 1994).

Once the plaintiff has established a prima facie case, defendant can rebut the prima facie case of discrimination by producing some evidence of legitimate, nondiscriminatory reasons for its actions. See id. at 1379.[3] In her brief, plaintiff admits that defendant "produced a facially valid nondiscriminatory reason for her termination, i.e., that she could not get along with grain vendors and co-workers." See Appellant's Br. at 20. After defendant meets its burden of production, plaintiff must present enough evidence for a reasonable jury to conclude that defendant's proffered reason is pretextual. See *Ingels v. Thiokol Corp.*, 42 F.3d 616, 622 (10th Cir. 1994).

Plaintiff attempted in two ways to establish that defendant's reasons for terminating her (complaints from vendors, customers , and subordinates and Mr. Morris's stated intention to quit) were pretextual, i.e., unworthy of belief. As to her claim of discrimination on the basis of gender, she claimed she was replaced by Mr. Morris, who she had

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[3] For purposes of summary judgment, the district court assumed plaintiff had established a prima facie case.

trained. See Appellant's App. at 132. She also contended that when two employees had complained to Mr. Olsen about a younger male supervisor, Mr. Olsen had backed the supervisor, and the complaining employees eventually quit, See id. However, there is no indication that the circumstances surrounding that situation were in any way similar to plaintiff's. She admitted that Mr. Olsen told her she was being terminated because of Mr. Morris's threatened resignation, see id. at 49, not because of age or gender. See id. at 52-53. She also admitted that Mr. Olsen had previously brought to her attention the fact that he had received a complaint about her from a customer, See id. at 51.

At the summary judgment stage, it is plaintiff's burden to show a genuine issue of material fact as to whether defendant's proffered reason for her termination is pretextual, i.e., unworthy of belief, See *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). That she was replaced by a male employee is an element of her prima facie case, not evidence that defendant's reasons for firing her was not believable. Mr. Olsen testified that he wanted to retain Mr. Morris, who was of greater value to the company. This is no more than a simple business decision, which, good or bad, courts will not second-guess. See *Sanchez v. Philip Morris, Inc.*, 992 F.2d 244, 247 (10th Cir. 1993) ("Title VII is not violated by the exercise of erroneous or even illogical business judgment.").

Plaintiff has also failed to show pretext by such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in defendant's proffered, legitimate reasons for terminating her that a reasonable fact finder could rationally fired them unworthy of credence and thus infer that defendant did not act for the asserted nondiscriminatory reasons. See *Hardy v. S.F. Phosphates, Ltd., 185 F.3d 1076, 1080 (10th Cir. 1999).* Accordingly, plaintiff has failed to

establish defendant's reasons for her termination were pretextual.

Under the ADEA, it is unlawful for an employer to discharge an employee because of the individual's age. See 29 U.S.C. § 623(a)(1). In order to prevail on an ADEA claim, plaintiff must prove that her age was a determining factor in defendant's decision to terminate her. See *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557 (10th Cir. 1996). She need not prove that age was the only reason for her termination, but rather that age made a difference in defendant's decision. See id.

To demonstrate a prima facie case, plaintiff must show that (1) she was within the protected age group; (2) she was doing satisfactory work; (3) she was discharged despite the adequacy of her work; and (4) a younger person replaced her. See *Ingels*, 42 F.3d at 621.[4] If plaintiff makes such a showing, defendant must then articulate a nondiscriminatory reason for the termination, see id. at 621, following which plaintiff must show that the proffered reason was not the true reason for the employment decision. See *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526, 529 (10th Cir. 1994).

Plaintiff stated she believed that she was discharged based on her age "because I was replaced by a much younger male." Appellant's App. at 52. When asked whether, other than the fact that her replacement was a younger man, there were other facts to support her discharge based on age, she replied, "sex, probably." See id. As noted earlier, she admitted that she was not told she was being terminated based on her age or gender. See id. Other than her belief that she was replaced

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[4] The district court also assumed plaintiff had made a prima facie case under the ADEA.

because of age and gender, however, she offered no additional facts to support this claim, See id. at 53.

In sum, plaintiff has failed to show that her age had anything to do with her termination.

Instead, she claims she has shown pretext based on the facts that her replacement was a twenty-four year old, Mr. Olsen had reprimanded other, younger, employees but not fired them, and that Mr. Olsen promoted her to the position of office manager after receiving complaints from grain vendors or co-workers. See Appellant's Br. at 20. However, the evidence reflects that it was plaintiff's unacceptable behavior, and particularly the potential departure of a more valuable employee, that caused her termination. In his affidavit, Mr. Olsen stated that plaintiff and Mr. Morris did not get along and that Mr. Morns had been persuaded not to quit on an earlier occasion. The fact that she thought there was "no personality conflict between herself and Dane Morris, her subordinate," see Appellant's Br. at 17, is irrelevant. "It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance." *Furr v. Seagate Technology, Inc.*, 82 F.3d 980, 988 (10th Cir. 1996).

Although plaintiff did not think defendant's reason for terminating her was valid, Appellant's App. at 49, or justified or right, see id. at 127, this is no more than her mere conjecture that defendant's explanation is a pretext for intentional discrimination and therefore an insufficient basis for denying summary judgment. See *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1996).

Accordingly, the judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

Carlos F. Lucero

Circuit Judge